

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KENNETH JAMES SNOW,

Defendant-Appellant.

UNPUBLISHED

March 3, 1998

No. 195656

Jackson Circuit Court

LC No. 95-074454-FH

Before: Markey, P.J., and Bandstra and Markman, JJ.

PER CURIAM.

Defendant appeals as of right his conviction by a jury of involuntary manslaughter with a motor vehicle, MCL 750.321; MSA 28.553. Defendant was the driver of a vehicle, being driven allegedly in excess of 100 mph, which crashed and caused the death of a passenger in the vehicle. He was sentenced to four to fifteen years' imprisonment. We affirm.

Defendant first argues that the trial court abused its discretion by admitting testimony that defendant appeared intoxicated at the scene of the accident where defendant's sobriety was not an issue at trial. We disagree. This Court reviews decisions to admit evidence for an abuse of discretion. *People v Lugo*, 214 Mich App 699, 709; 542 NW2d 921 (1995). Involuntary manslaughter is proven if the defendant acts in a grossly negligent, wanton, or reckless manner, causing the death of another. *People v Moseler*, 202 Mich App 296, 298; 508 NW2d 192 (1993). Here, defendant's apparent intoxication at the time of the accident was not offered to show that this factor alone made defendant grossly negligent. Rather, in addition to defendant's excessive speeding, it was relevant to and probative of whether defendant acted with gross negligence in operating his vehicle. Further, the probative value of this evidence was not substantially outweighed by the danger of unfair prejudice in light of the court's jury instructions to the effect that the jury could infer from chemical testing that defendant was *not* intoxicated. Accordingly, we find that the court did not abuse its discretion in admitting the evidence.

Next, defendant argues that evidence of defendant's prior accident with the same car and bald tires from his doing "burnouts" was inadmissible bad acts evidence because it was offered to imply

defendant's propensity to drive recklessly. We disagree. The challenged evidence was elicited upon cross-examination of defendant. Defendant had testified on direct examination that the cause of the accident was a faulty cruise control device and had denied that his driving in excess of the speed limit was a cause of the accident. Although this evidence was ruled inadmissible under 404(b) in plaintiff's case-in-chief, it was properly admitted for the purpose of impeaching defendant's credibility and addressing his theory of why he was not responsible for the accident. See *People v Harris*, 113 Mich App 333, 337; 317 NW2d 615 (1982). Accordingly, we find no error.

Defendant next argues that the prosecutor made comments in his closing argument that were unsupported by the evidence, shifted the burden of proof, and impermissibly attacked defense counsel's credibility, thus depriving defendant of a fair trial. We disagree. The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Paquette*, 214 Mich App 336, 342; 543 NW2d 342 (1995). Review of allegedly improper prosecutorial remarks is foreclosed if defense counsel fails to object unless the prejudicial effect of the comments was so great that it could not have been cured by an appropriate instruction, or a failure to review the issue would result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

Defendant specifically argues that the prosecutor's statements that there was "no evidence" of either acceleration or braking were unsupported by the record because defendant himself testified that he tried to disengage the cruise control by tapping the brakes, and by hitting the accelerator, which only caused the car to accelerate. It is true that a prosecutor may not make a statement of fact to the jury which is unsupported by the evidence. *Stanaway, supra*, 686. However, the prosecutor's misstatement here could have been cured by a timely instruction reminding the jury of defendant's testimony. Therefore, these statements did not deprive defendant of a fair trial.

Defendant next argues that the prosecutor improperly shifted the burden of proof by stating that there was no evidence of either acceleration or braking and thus implied that defendant had the responsibility to prove that there was. An argument by a prosecutor which suggests that the defendant must prove something may shift the burden of proof. *People v Kenneth Smith*, 143 Mich App 122, 135; 371 NW2d 496 (1985). However, where a defendant testifies at trial, comments by the prosecutor regarding the defendant's failure to produce corroborating evidence merely point out the weaknesses in the defendant's case and do not shift the burden of proof onto the defendant. *People v Carlton Brown*, 126 Mich App 282, 289; 336 NW2d 908 (1983). Also, when there is no evidence to support a defendant's denial of an element of the offense, it is not error for the prosecutor to say so. *People v Foster*, 40 Mich App 406, 408; 198 NW2d 923 (1972). Therefore, although not entirely accurate, the prosecutor's comments that there was no evidence of either acceleration or braking were merely an attempt to point out the weaknesses in defendant's case and were not error.

Defendant also argues that the prosecutor's comments that defense counsel was misleading the jury were designed to direct the jury's attention to defense counsel's character. A prosecutor cannot personally attack the credibility of defense counsel because this infringes on the defendant's presumption of innocence. *People v Kennebrew*, 220 Mich App 601, 607; 560 NW2d 354 (1996). Also, when a prosecutor contends that defense counsel is intentionally trying to mislead the jury, he is in effect stating that defense counsel does not believe his own client, which undermines the defendant's presumption of

innocence and impermissibly shifts the focus from the case to the defense counsel's personality. *People v Dalessandro*, 165 Mich App 569, 580; 419 NW2d 609 (1988). However, no such miscarriage of justice occurred here, especially in light of the court's instructions regarding the presumption of innocence and that the lawyers' statements and arguments are not evidence. Further, defendant failed to object to these comments, and a timely cautionary instruction could have cured any prejudice. In our judgment, these comments did not deprive defendant of a fair trial.

Affirmed.

/s/ Jane E. Markey

/s/ Richard A. Bandstra

/s/ Stephen J. Markman